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No. 85-1611

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1985

ROGER ARNEBERGH,

Petitioner,

vs.

E.F. HUTTON & COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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56pp

QUESTIONS PRESENTED FOR REVIEW

1. Where the jury has announced its verdict and been dismissed, and the parties disagree as to the meaning of that verdict, did the District Court act improperly when, pursuant to stipulation, it conducted a post-trial interview of the former jurors in order to ascertain the jury's true verdict?

2. Whether the District Court acted improperly when it entered judgment in accordance with the jury's understanding of its own verdict as expressed in the post-trial proceeding?

3. Whether the minimal post-trial contact between E.F. Hutton's counsel and two of the jurors somehow influenced the jury's ability to recall its intended verdict?

RESPONDENT'S CORPORATE AFFILIATIONS

E.F. Hutton & Company, Inc. is a subsidiary of the E.F. Hutton Group, Inc. The E.F. Hutton Group, Inc.'s other major subsidiary is The E.F. Hutton Insurance Group, Inc.

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I. INTRODUCTION

This litigation arises from two transactions in commodities trading accounts

maintained by Roger Arnebergh with E.F. Hutton & Company, Inc. ("E.F. Hutton"). Judgment was entered in the district court against Arnebergh in the amount of $168,307. That judgment was affirmed by the Ninth Circuit. Now, in a last ditch effort to avoid the judgment, Arnebergh has filed a Petition For A Writ of Certiorari to this Court. The Petition is wholly without merit.

II. OPINIONS BELOW.

1. The opinion of the United States Court of Appeals for the Ninth Circuit for the consolidated cases Nos. 83-6195/6222 is published as E.F. Hutton & Company, Inc. v. Arnebergh, 775 F.2d 1061 (9th Cir. 1985), and appears in Petitioner's Appendix page A-1.

2. The Ninth Circuit's Order amending its Opinion and denying rehearing and hearing en banc appears in Petitioner's Appendix page A-22.

3. The District Court's Order Re Entry of Judgment, and Judgment of General and Special Verdicts were not published but appear in Petitioner's Appendix pages A-29 and A-24, respectively.

4. The Special Verdict in Favor of Roger Arnebergh appears in Petitioner's Appendix page A-36.

5. The Verdict in Favor of E.F. Hutton appears in Petitioner's Appendix page A-56.

6. The District Court's Order Denying Motion For Judgment Notwithstanding The Verdict Or For New Trial And Denying Motion To Alter Or Amend The Judgment Or For New Trial appears in Petitioner's Appendix page A-58.

III. JURISDICTION.

Respondent E.F. Hutton agrees with Petitioner's statement of jurisdiction. The Ninth Circuit opinion was filed November 5, 1985. The Ninth Circuit denied Arnebergh's Petition For Rehearing, together with a Request For

Hearing En Banc on January 23, 1986.

Arnebergh's Petition For A Writ Of Certiorari was received by E.F. Hutton on March 31, 1986. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Seventh Amendment to the United States Constitution states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Rule 606(b) of The Federal Rules of Evidence states:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in

> connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

V. STATEMENT OF THE CASE

1. Factual Background.

On March 7, 1980, Arnebergh bought five December 1980 silver futures contracts through E.F. Hutton. (RT 130, 199, 404) This transaction required a total consideration of more than $930,000. Under the margin requirements, however, Arnebergh was required to deposit only approximately $225,000. (CR 17 at 5) At the time of his purchases, Arnebergh believed that silver would increase in value. This belief turned out to be wrong. For nine consecutive trading days after Arnebergh's purchase silver was "down limit." (RT 133-134,

258) "Down limit" means that there was so much downward pressure on the price of silver that the exchange did not allow free trading but rather allowed the price to fall only by a particular prescribed limited amount. During this period, Arnebergh lost approximately $25,000 per day and by March 13, 1980 his margin deposit was insufficient to secure the balance of the required consideration. (RT 205, 333-334, 406; CR 17 at 5) Orders to liquidate the trades were entered, but could not be executed because the market continued "down limit" each day and there were no buyers.

On about March 17, 1980, it appeared that trading might resume. (RT 413) Arnebergh maintained his belief that silver would go up, so he endeavored to provide E.F. Hutton with more collateral to prevent his positions from being liquidated. Arnebergh gave E.F. Hutton a post-dated check for $100,000, but he did not have sufficient funds to cover the check.

(RT 136) Arnebergh also gave E.F. Hutton a promissory note and a deed of trust on certain real estate he owned. (RT 140-142, 143-144)

The market continued down limit for several days until it experienced a very brief rally on April 8, 1980, at which time Arnebergh and E.F. Hutton agreed to a "stop loss" sales order. (RT 240, 443-44) When the market continued its downward trend, that order was executed and Arnebergh's five December 1980 silver contracts, purchased at $37.27 per ounce, were sold at $16 40 per ounce. (RT 152-3, 453)

Arnebergh attempted to recoup his losses with the purchase of one contract for silver in the spot market (current month). (RT 149) When his promissory note matured on May 27, 1980, Arnebergh was unable to pay it or otherwise pay for the losses he sustained. (RT 241) Accordingly, his spot contract was liquidated, leaving a balance of approximately $267,500 owing from him to E.F. Hutton in May 1980. (RT 355)

E.F. Hutton filed its Complaint in the federal district court for the Central District of California on May 29, 1980 to recover the balance due from Arnebergh, plus interest. (CR 1) Arnebergh filed a separate Complaint in California state court on May 20, 1980 which sought both to avoid paying the amount owing on his account through an offset, and to recover other claimed damages. Arnebergh's theories were based on his allegation that E.F. Hutton had promised not to liquidate his silver positions in spite of the growing deficit in his account. (CR 1A)

2. Procedural Background.

Arnebergh's Complaint was removed to federal court on June 25, 1980. (CR 1) Shortly thereafter, the two cases were consolidated and in February 1983, the consolidated cases were tried to a jury in an eight-day trial. (CR 33) Contrary to Arnebergh's contentions at page 27, these cases were not "separate and

distinct" since they involved the same set of facts. The parties stipulated that Arnebergh owed E.F. Hutton an account balance of $336,614, which represented the $267,500 deficiency plus interest. Counsel for E.F. Hutton requested that the jury form include the fact that the parties had stipulated to that amount. Arnebergh objected and such a statement was omitted. The stipulated amount, however, was included in jury instruction No. 16 (CR 72). Therefore, the jury knew that Arnebergh had stipulated that he owed E.F. Hutton $336,614. The jury was given a special verdict form as to Arnebergh's claims and a general verdict form as to E.F. Hutton's claims. (CR 77, 78)

In its verdicts, the jury awarded Arnebergh half of the stipulated damages plus punitive damages in the amount of $100,000. The jury found that E.F. Hutton breached an express contract and the implied covenant of good faith and fair dealing. (CR 77 at 2, 3)

The jury further found both Arnebergh and E.F. Hutton were equally negligent and that E.F. Hutton had converted Arnebergh's property. (CR 77 at 5, 7) The jury found E.F. Hutton committed no fraud, did not violate the Commodity Exchange Act, and did not breach a fiduciary duty owed to Arnebergh. (CR 77 at 5, 6, 8)

The jury awarded compensatory damages in favor of E.F. Hutton against Arnebergh and compensatory and punitive damages in favor of Arnebergh against E.F. Hutton. (CR 77, 78) Contrary to Arnebergh's contention at page 17, however, the amount of compensatory damages awarded to each party is very much in dispute.

After the verdicts were announced, E.F. Hutton's counsel, Edward Simpson, asked that the jury be polled. Arnebergh's attempt to characterize (page 33) the polling of the jury as somehow indicative of a belief that E.F. Hutton has lost the case is absurd. As every

trial lawyer knows, it would be more unusual for the jury not to be polled.

Confusion arose as to the meaning of the jury's compensatory damage award. On February 9, 1983, the day after the trial, the District Court clerk telephoned Mr. Simpson and stated he was uncertain as to the form of the judgment to be entered. (CR 82 at 16) Mr. Simpson told the clerk that he believed the verdicts reflected an equal division of the account deficiency, and that the net judgment was in favor of E.F. Hutton in the amount of $168,307, from which the punitive damage award would be subtracted. (Id.) The clerk suggested that Mr. Simpson call Arnebergh's attorney and agree on the form of the verdict. (Id.) Mr. Simpson attempted to do so only to discover that Arnebergh believed the account debit balance owing to E.F. Hutton had been wiped out and that Arnebergh owed E.F. Hutton nothing. (Id.)

These conflicting interpretations of the jury's verdicts led Mr. Simpson to initiate contact with two former jurors to determine the true meaning of their verdict. (CR 82 at 19 ¶19) Four days after the trial, one juror, Mrs. Adams, told Mr. Simpson that the jury had agreed that Arnebergh was to pay back half of the deficiency in his E.F. Hutton account. (CR 82 at 20-21 ¶22) The second juror, Mr. Hamilton, told Mr. Simpson that he did not believe the verdicts were intended to cancel each other out but that he would have to check his notes to be sure. Before Mr. Simpson could get back to Mr. Hamilton, District Court Judge Malcolm M. Lucas ordered Mr. Simpson to show cause why he should not desist from jury interviews. (CR 80)

After the hearing on the Order to Show Cause, Judge Lucas called all parties to a conference. At that conference, Judge Lucas acknowledged that there was confusion

surrounding the meaning of the verdict. The parties could not determine whether the jury's verdicts were gross figures, to be applied against each other, or net figures after offsets, or some combination of the two (CR 82 at 16-17). Judge Lucas suggested an in camera meeting between the Judge and the jurors.

Contrary to Arnebergh's argument at page 35, both counsel agreed to the in camera proceeding. Though Arnebergh's attorney initially objected to examination of the jurors, he did sign a stipulation for an in camera examination. Judge Lucas approved the stipulation and on March 2, 1983, ordered the in camera examination. (CR 85)

The in camera proceeding was held on March 15, 1983. At this time, Judge Lucas told the jurors that the purpose of the proceeding was to "assist the Court in understanding the meaning of the verdicts that you [the jury] rendered on February the 8th." (Reporter's

Transcript of in camera proceedings, hereinafter "RT-in camera," at 3)[1/] The jurors were then handed copies of the verdict. Judge Lucas reminded the jurors that they had returned a verdict in favor of E.F. Hutton and against Arnebergh in the amount of $168,307 and also returned a verdict in favor of Arnebergh in the exact same amount. (RT-in camera at 3, 4) Judge Lucas also reminded the jurors that $168,307 was exactly one-half of the sum of $336,614, the stipulated amount of E.F. Hutton's damages. (RT-in camera at 4)

Judge Lucas told the jurors that their verdicts had caused confusion because the awards could be interpreted in two ways. The verdicts could mean that Arnebergh was to pay half of the deficiency in his account, i.e., Arnebergh would owe E.F. Hutton $168,307, and

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1/ The Reporter's Transcript of the in camera proceedings is included in the Appendix.

E.F. Hutton would absorb the other half and incur a $168,307 loss. In the alternative, the verdicts could mean that Arnebergh was to pay E.F. Hutton $168,307 and E.F. Hutton was to pay damages of the same amount to Arnebergh, thus cancelling out the money owed by Arnebergh. (RT-in camera at 5)

Judge Lucas asked the jurors to determine whether they were in agreement as to their verdict and if so, what the verdict meant. (RT-in camera at 6, 7) Judge Lucas warned the jurors that if they disagreed as to what was intended, they should simply determine that there was disagreement. (RT-in camera at 6) Judge Lucas specifically told the jurors that this proceeding "is not a period for further deliberation." (RT-in camera at 7)

The jurors took less than five minutes to determine that they were in accord as to the meaning of their verdict. (RT-in camera at 7) Their verdict had always been intended to

mean that Arnebergh was to pay back half of his account deficiency, and E.F. Hutton was to absorb the other half. (RT-in camera at 7-8) Judge Lucas entered judgment in accordance with the verdict on March 25, 1983. (CR 91)

Arnebergh made a Motion to Alter or Amend the Judgment, Or in the Alternative, for a New Trial. (CR 93) The Motion was denied. Arnebergh then filed his Appeal to the Ninth Circuit. (CR 103) In his Appellant's Brief, Arnebergh contended that the District Court erred in its examination of the jury by misrepresenting the facts, erred by doubling the amount of compensatory damages awarded E.F. Hutton and erred by denying Arnebergh's costs and attorneys' fees. (Arnebergh Brief at 2-3)

E.F. Hutton filed a cross appeal to the Ninth Circuit. (CR 104) E.F. Hutton contended that the District Court erred in awarding punitive damages to Arnebergh because there was insufficient evidence to establish the

requisite "oppression, fraud or malice" and that the punitive damage award was contrary to law. E.F. Hutton also contended that the jury instruction on breach of the implied covenant of good faith and fair dealing in a commercial setting was improper.

The Ninth Circuit found Judge Lucas' actions to be proper and affirmed the decision of the District Court. In a concurring opinion, Judge Fletcher stated that the original verdict was unambiguous and was consistent with the District Court's ultimate judgment.

VI. SUMMARY OF ARGUMENT

The Ninth Circuit's opinion is consistent with opinions in other circuits which allow juror testimony to ascertain the intended verdict. The in camera proceeding was fair and reasonable. The jurors did not impeach their verdict, but rather indicated that Arnebergh had misinterpreted that verdict. At no time did the jury re-examine their original factual

determinations. Judge Lucas did not double the amount of compensatory damages awarded, he entered judgment in conformity with the jury's understanding of its own verdict. Arnebergh has not been deprived of his Seventh Amendment right to trial by jury. Accordingly, Arnebergh's Petition should be denied.

VII. REASONS FOR DENYING THE WRIT

A. Arnebergh Was Not Denied His Right To A Jury Trial.

1. Post-Trial Examination Of The Jury Was Proper, Fair And Reasonable and in No Way Violated Rule 606(b) Of The Federal Rules of Evidence.

Arnebergh's Petition is based entirely on the erroneous proposition that the District Court examined the jurors to impeach their verdicts, or to require further deliberation. Contrary to Arnebergh's contentions at page 19 that the jury re-examined its factual determinations, Judge Lucas specifically told the jurors that the in camera proceeding was "not a

eriod for further deliberations." (RT in amera at 7) At no time were the jurors asked o impeach their verdicts.

Rule 606(b) of the Federal Rules of Evidence prohibits use of juror testimony to mpeach a verdict. Arnebergh claims that Rule 06(b) prohibited Judge Lucas from conducting he in camera proceedings. The federal rules, owever, provide no prohibition against a district court judge asking the jury to clearly tate its verdict.

The federal courts' central concern egarding Rule 606(b) is the insulation and rotection of the processes through which the ury reaches its verdict. 10 J. Moore, Moore's ederal Practice § 606.01(6). Since the in amera examination of the jurors in no way nquired into the jury's decision-making proesses, it did not violate Rule 606(b).

Jurors are competent witnesses for the urpose of showing that the verdict returned to

the court was not the agreement actually reached in the jury room and not the verdict actually agreed upon. Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 110 (10th Cir. 1973); Fox v. United States, 417 F.2d 84, 88-89 (5th Cir. 1969); Young v. United States, 163 F.2d 187, 189 (10th Cir.), cert. denied, 332 U.S. 770, 68 S. Ct. 83, 92 L. Ed. 355 (1947) and 334 U.S. 859, 68 S. Ct. 1533, 92 L. Ed. 1779 (1948).[2/]

2/ See also, United States v. Love, 597 F.2d 81 (6th Cir. 1979); University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 547 n.43 (5th Cir. 1974); Freid v. McGrath, 135 F.2d 833, 834 (D.C. Cir. 1943); Hamburg-Bremen Fire Ins. Co. v. Pelzer Manuf'g. Co., 76 F. 479, 481-482 (4th Cir. 1896); Rose v. Thau, 45 App.Div.2d 182, 357 N.Y.S.2d 201, 203-204 (1974); Moulton v. Staats, 83 Utah 197, 27 P.2d 455, 459 (1933); McCabe Lumber Co. v. Beaufort County Lumber Co., 187 N.C. 417, 121 S.E. 755, 755-756 (1924); Carlson v. Adix, 144 Iowa 653, 123 N.W. 321, 321-322 (1909); Peters v. Fogarty, 55 N.J.L. 386, 26 A. 855, 855-856 (1893); 76 American Jurisprudence Second, Trial, Section 1225, page 179; Annotation

In Continental Baking Co. v. Old Homestead read Co., supra, 476 F.2d 97, the jury eturned a verdict in favor of the plaintiff on ach of four claims in the amount of $262,125. n response to a question posed by plaintiff's ttorney, the foreman stated that it was the ntention of the jury that the amounts awarded n each of the four claims were to be added ogether to arrive at the total amount of dam- ges. The Judge submitted a supplemental nterrogatory to the jury inquiring as to the mount of total damages suffered by plaintiff o which the jury responded $1,048,500. The riginal four verdicts were then returned to he jury and the jury crossed out the amounts f $262,125 and inserted $1,048,500 on each of he four verdicts. On appeal, defendant claims he interrogatory allowed the jury to impeach ts verdict.

The Tenth Circuit affirmed the district ourt's action and, citing Young v. United

States, supra, 163 F.2d at 189, stated at page 110:

> "[J]urors are competent witnesses for the purpose of showing that . . . the substance of the verdict returned into court, was not the verdict on which agreement was actually reached in the jury room . . ."

In Young v. United States, supra, 163 F.2d 187, three defendants were tried for various criminal violations relating to liquor sales. The jury returned guilty verdicts as to each defendant but on different counts. After the jury was discharged, individual jurors realized that the verdicts announced in open court were not the verdicts arrived at in the jury room. Certain defendants had been found guilty of certain counts when the jurors intended that they be found innocent and innocent when the jurors intended that they be found guilty.

Though the Tenth Circuit stated that juror affidavits were impermissible to impeach the verdict, it allowed the juror affidavits to

correct the verdict. The Court stated at 189: "Correction or reformation of a verdict is one thing. Impeachment is quite another." The Court also stated that the exclusion of juror testimony for impeachment

> "does not prevent the reception of evidence of jurors to show that through mistake, the real verdict on which agreement was reached in the jury room was not correctly expressed in the verdict returned into open court."

Where the agreement actually reached by the jury is incorrectly expressed in the verdicts, juror testimony may be used to rectify the situation without violating the rule against impeachment.

In Fox v. United States, supra, 417 F.2d 84, the United States government filed a libel of information which alleged that defendant was in possession of substantial quantities of a condemned and mislabeled drug product. The jury returned a verdict in favor of the government. After the verdict was announced, the

clerk polled the jury by calling each juror's name "in rapid succession." Each juror answered with an audible "yes" except the eighth juror who gave no audible response. Immediately after the jury was discharged, defendant's counsel approached the juror who had given no response and inquired whether he had in fact voted for the government. The juror stated that he had not.

Defendant's counsel moved for a new trial and attached the affidavits of five jurors to his motion. The district court denied the motion because it was of the opinion that the affidavits could not be considered without violating the rule against allowing a juror to impeach his verdict. The Fifth Circuit reversed the district court and stated: "It has long been well settled that the affidavit of a juror is admissible to show the true verdict. . . ." 417 F.2d at 89.

The case at bar did not involve a quotient verdict or a verdict that was the result of a compromise as Arnebergh suggests at pages 24-26. At no time did Judge Lucas did not inquire into the jury's decision-making processes. Therefore, the cases cited by Arnebergh at pages 24-26 are irrelevant.

In addition, Arnebergh cites Traver v. Meshriy, 627 F.2d 934 (9th Cir. 1980), and People v. Romero, 31 Cal. 3d 685, 646 P.2d 824 (1982), for the proposition that the in camera proceeding was improper. Though the Traver case correctly states the law regarding impeachment, Arnebergh has missed the critical distinction between ascertaining the jury's "true verdict" and impeachment of that verdict. Judge Lucas did not inquire into the jury's deliberations as was the case in Traver. Rather, Judge Lucas inquired as to the jurors' intended meaning. At no time did he ask the jurors to alter their verdict.

Furthermore, Arnebergh fails to address the strong dissent in Romero in which the Chief Justice of the California Supreme Court states at 696-97:

> "In the courts of virtually all of our sister states and the federal circuits, juror affidavits are admissible to prove that a recorded verdict does not conform to the actual verdict agreed to by the jury after deliberations. This doctrine is so well settled that a complete listing of the cases so holding would fill a page." (citations omitted)

The majority opinion in People v. Romero is an aberration of both state and federal law and therefore should not be considered.

The in camera procedure was fair to all parties. There had been disagreement among the parties as to the meaning of the jury's verdict. As a result of this disagreement, the District Court ordered an in camera examination of the former jurors. The only question put to the jurors was whether they agreed on what their verdict meant, not how they arrived at it

or whether it should be reconsidered. (RT-in camera at 6) The District Court informed the jurors of the source of confusion and allowed them to discuss the issue in private. (RT-in camera at 5-6) In less than five minutes, the jury informed the Court that its verdict was always intended to mean that Arnebergh and E.F. Hutton were each responsible for one half of the total debt of $336,614: Arnebergh was to pay $168,307 to E.F. Hutton and E.F. Hutton was to absorb the other $168,307 loss. (RT-in camera at 7-8) The jurors did not intend the verdict to mean the amounts cancelled each other out, thereby resulting in Arnebergh owing E.F. Hutton zero. Nothing in the law precludes the District Court from asking jurors to determine whether they were in agreement as to the meaning of their verdict. Judge Lucas inquired into the jury's true verdict and his actions were proper.

2. The Judgment Entered By The District Court Conforms To The Verdicts Returned By The Jury.

Arnebergh's contention that the District Court's judgment does not conform to verdicts returned is directly contradicted by the jury's understanding of its own verdict. The jurors themselves intended the effect of their verdict to be a 50/50 split of the total damages. (RT-in camera at 7-8) This decision is presumably based on the jury's attribution of 50% of the negligence to Arnebergh. Jury instruction No. 16 informed the jury that the total amount of damages owed to E.F. Hutton claimed was stipulated to be $336,614. The compensatory damages verdicts rendered by the jury were for identical amounts, $168,307. This amount is 50% of the stipulated total.

The District Court did not double the amount of compensatory damages as Arnebergh erroneously claims at page 19. Rather, the District Court entered judgment exactly as the

jury intended. While Arnebergh may be dissatisfied with the judgment of the District Court, his argument that the judgment is inconsistent with the jury's verdicts is meritless.

3. Post-Trial Contact With The Jurors Was Permissible And Did Not Influence The In-Camera Proceeding.

There is nothing wrong with an attorney initiating communication with jurors after a case has been completed. The only restriction placed upon trial counsel's right to communicate with jurors is the prohibition against asking harassing and embarassing questions. California Rules of Court, West Annotated California Codes Civil and Criminal Court Rules Part II, page 579-580; Martindale-Hubbell Law Directory, Volume IIV, ABA Codes, Part IIIV, page 27.

Furthermore, an attorney has an obligation of zealous representation to his or her client. Oftentimes this duty cannot be fulfilled unless the attorney speaks to former jurors. Ethical

Consideration 7-29 of the ABA Code of Professional Responsibility, Martindale-Hubbell, Volume IIV, Part IIIV, American Bar Association Codes, page 25 states:

> "Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected."

Further, ABA Opinion 319 (1968) states that where:

> "the testimony and affidavits of jurors may be received in support of or against the motion for a new trial, a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist and it is not unethical for him to talk to and question jurors."

Restrictions placed upon trial counsel in his ability to interview jurors beyond the prohibition against harassment or embarrassment would interfere with counsel's obligation to represent his client with zeal. The jurors who served on the panel of this case served an

important public function. A juror's duty to the judicial system, just as a lawyer's duty to his client, however, does not end upon the juror's discharge. Talking to counsel is not an unreasonable burden to impose on a juror where counsel is concerned that the basis for a new trial may exist or, as in this case, the verdict returned was not the verdict on which agreement was reached. Jurors are as interested in ultimate justice as is the Court. Mr. Simpson initiated contact with the jurors for the sole purpose of exploring whether grounds existed for a new trial for his client and for the purpose of determining whether the verdict, as interpreted by Arnebergh's attorney, was actually the verdict reached by the jury in the jury room. Such inquiry is not only proper but, if not pursued, tantamount to the abandonment of one's client.

Contrary to Arnebergh's contentions at pages 33-35, Mr. Simpson's contact with the

jurors did not "taint" their opinions. Immediately after the jury was dismissed, Mr. Simpson spoke to three jurors in the hallway of the courthouse. (CR 82 at 15 ¶ 8) After some general discussion, Mr. Simpson asked the jurors whether the compensatory damage award relieved Arnebergh of his $336,614 account deficiency or whether he was to pay half of that deficiency and E.F. Hutton was to absorb the other half. Id. Before the jurors could answer, Arnebergh and his attorney arrived in an "ecstatic and exuberant" mood and thanked the jurors for their decision. Id. One of the jurors appeared to be confused. Id. Therefore, if anyone's actions served to "taint" the jurors' impression, they were the actions of Arnebergh.

Mr. Simpson's only other contacts were short telephone calls. Seven days after the trial, Mr. Simpson telephoned Mr. Hamilton and left a message on his answering machine. (CR

82 at 19 ¶ 17) The same evening Mr. Simpson spoke to Mr. Hamilton who said he would call Mr. Simpson the following day. (CR 82 at 19 ¶ 18) On February 16, 1983 Mr. Hamilton telephoned Mr. Simpson and stated that he did not believe the verdicts were intended to cancel each other out but that he would have to check his notes to determine what was intended. (CR 82 at 19-20 ¶ 20) Mr. Simpson had no further contact with Mr. Hamilton.

On February 15, 1983, Mr. Simpson left a message for Mrs. Adams who returned the call the following day. (CR 82 at 19 ¶ 19 and 20 at ¶ 21) Mr. Simpson told Mrs. Adams there was "confusion to what the verdicts meant and that perhaps the verdicts did not mean what the jury intended."[3/] Mrs. Adams stated that the jury

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(1968) 18 A.L.R.3d 1132, 1137-1138, section 3 and cases cited; 8 Wigmore, Evidence (McNaughton rev. ed. 1961) Section 2355, pp. 718-721; Model Code of Evidence, Rule 301, com. a p. 175.

intended that Arnebergh pay half of the deficiency in his account and that he was to pay E.F. Hutton $168,307. (CR 82 at 20-21 ¶ 22)

On February 16, 1983, eight days after the verdicts were announced, Mr. Simpson was informed that Judge Lucas had issued an Order to Show Cause re Jury Interviews. (CR 82 at 21 ¶ 25) At that time, Mr. Simpson ceased all contact with the jurors.

Mr. Simpson's contact with the jurors was considerate, professional and objective. He only sought information. He in no way influenced the jurors' recollection of their intended verdict. Arnebergh's arguments to the contrary are without support.

VII. CONCLUSION

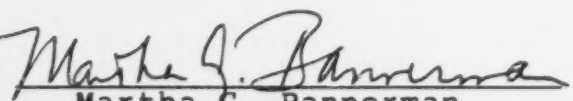
Arnebergh's Petition is without merit and should be denied. His contention that the District Court's effort to ascertain the true meaning of the jury's verdict rendered and to enter a judgment in accordance with those

verdicts was impermissible simply ignores the District Court's intention and actions. It also ignores the overwhelming authority which permits the use of juror testimony to ascertain the intended verdict. A review of the record indicates that the judgment entered was exactly consistent with the jury's true verdict.

Dated: May 1, 1986

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE
MARTHA G. BANNERMAN

By 
Martha G. Bannerman
Attorneys for Appellee
E.F. Hutton & Company, Inc.

APPENDIX

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE MALCOLM M. LUCAS, JUDGE PRESIDING

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E. F. HUTTON & COMPANY, INC., etc. Plaintiff, vs. ROGER ARNEBERGH, et al., Defendants.	Nos. CV 80-2273-MML CV 80-2721-MML
ROGER ARNEBERGH, Plaintiff, vs, E.F. HUTTON & COMPANY, INC., etc., Defendants.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, March, 1983

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Official Court Reporter
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APPEARANCES OF COUNSEL:

For Roger Arnebergh:

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(NOT PRESENT)

For E.F. Hutton & Company, Inc.:

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(NOT PRESENT)

LOS ANGELES, CALIFORNIA; TUESDAY, MARCH 15, 1983; 8:40 A.M.

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(The following proceedings were had between the Court and the jurors in chambers, with no counsel present:)

THE COURT: Well, we are meeting again with the express intent and, for that matter, I suppose, desire of counsel, and it's to assist the Court in understanding the meaning of the verdicts that you rendered on February the 8th. This, of course, is a somewhat unusual procedure as cases go, but it's necessary in this case. I believe that several of you have been contracted by counsel in this case earlier, and then the Court met with counsel, and we finally determined together that it would be better and necessary for the Court to make inquiry to determine what the correct interpretation of your verdict was.

So of course, as I say, counsel have agreed that the court can and should meet with you and discuss this matter. You've been given a package here this morning. It has a copy of the verdicts; I think it's all the verdicts, some of which you, of course, didn't fill out, some of which you did, but a copy of all the verdicts you were given, and your verdicts, of course, that you returned on February the 8th.

Now, the apparent difficulty in this case is in the interpretation as it concerns the compensatory damages, that is, damages other than the punitive damages. We're not going to concern ourselves at all today with the question of the punitive damages; only with the compensatory damages.

Now, you've been given a copy of jury instruction No. 16, which I gave in this case, and as you will see, on the bottom portion of 16, it provided as follows, and I'll read that portion that I'm referring to: "In this case,

the parties have agreed that E.F. Hutton has established by a preponderance of the evidence all of the facts necessary to prove that the amount of the deficiency in Roger Arnebergh's commodity account maintained by him at E.F. Hutton's Farmer's Market office is $336,614.11. If you find that Roger Arnebergh has failed to establish all of the facts necessary to prove any of his several defenses or claims by a preponderance of the evidence, then you should render your verdict for that amount against the defendant Roger Arnebergh."

That's the end of the quotation on 16. Now, as you will note, of course, or I'm sure you remember, you returned a verdict in favor of E.F. Hutton and against Roger Arnebergh in the amount of $168,307, and you'll also remember that you returned a verdict in favor of Roger Arnebergh in the same amount. This amount, that is, $168,307, is half of the deficiency in Roger Arnebergh's account.

So against the background of the Court's jury instruction No. 16, which, of course, I just read to you, one could interpret these awards in one of two ways. On the one hand, the verdicts could mean that Arnebergh is only to pay half of the deficiency in his account. Under this interpretation, Roger Arnebergh would owe to Hutton $168,307, and E.F. Hutton must absorb the other half, that is, $168,307, as a loss.

On the other hand, these verdicts could mean that Roger Arnebergh is to pay to E.F. Hutton $168,307, and E.F. Hutton, or one or more of its employees, is to pay damages of the same amount to Roger Arnebergh, thus cancelling out the money Roger Arnebergh is to pay, and under the second interpretation, Roger Arnebergh effectively pays no money to E.F. Hutton on his deficiency account.

Now, there may be other interpretations of your verdicts that were rendered as well as

this, and I'm not attempting to in any way foreclose this possibility by suggesting that there are only two interpretations. However, these two alternate interpretations as I have suggested them to you are those that I see, at least, in the verdicts.

Now, I know it's been some time since you returned your verdicts, and so I think it would be appropriate for you to be able to discuss alone among yourselves briefly what your thoughts are and how you meant the verdicts to be understood. So I'm going to ask that my law clerk, reporter, and Duane, leave the room, and give you a period of time for further deliberation, or at least contemplation, about this. And again, you should simply determine whether or not you all meant the same thing by your verdicts when you returned them on February the 8th, 1983, and, if so, what that meaning was. If there is a disagreement among you now as to what you intended, don't attempt to convince

one another of the correctness of a different meaning. Simply determine that there is disagreement. And once you have determined whether or not you agree or disagree, then Mr. Anderson, your foreman, should come out into the secretary's office, tell us that you are ready to discuss your findings, and then we'll go back again on the record and discuss your conclusion.

So to summarize, remember you're to ignore the question of punitive damages at this time. You are only to consider the meaning of the verdicts concerning the so-called compensatory damages. I have suggested two understandings of the verdicts. Under the one, Roger Arnebergh was to pay half of his account deficiency, and E.F. Hutton was to absorb the other half. Under the other understanding, Roger Arnebergh was to receive from E.F. Hutton an amount equal to the amount he was to pay to

E.F. Hutton, thus leaving the parties owing each other nothing.

Now, again, you may also possibly conclude that something different was intended than these two interpretations. But, at any rate, as soon as you have determined whether or not you agree as to an interpretation, Mr. Anderson should inform the secretary, and then I'll return, and we'll discuss the matter together. This, I should emphasize, is not a period for further deliberation. We're really not reopening the case. We're trying to simply decide what you meant when the verdicts were returned on February the 8th.

Okay. We're going to withdraw, and you're now, in the judge's chamber, judges of the facts again, insofar as your verdicts, at any rate. You let us know when you're ready.

(Recess taken.)

THE COURT: Well, I'd say that less than five minutes is pretty speedy thinking on this case.

JUROR ANDERSON: We pretty much thought it out when we first deliberated. Just needed to clarify it. So it was number one of which you had said, really.

THE COURT: Okay. For the record, then, number one, as I described it, was that Roger Arnebergh was to pay half of his account deficiency, and E.F. Hutton was to absorb the other half?

JUROR ANDERSON: Yes.

THE COURT: All right. Perhaps I should --

JUROR ANDERSON: Because we worked on a 50-50 basis pretty much. So back on this one question, I noticed --

JUROR ADAMS: We got confused with the forms. We didn't realize they were going to cancel each other out.

THE COURT: Okay. Let me --

JUROR HAMILTON: May I say one thing, your Honor?

THE COURT: Sure. Perhaps, just for the record, you should identify yourself.

JUROR HAMILTON: Okay. Warren Hamilton.

The reason we didn't fill out the -- I think the guilty/not guilty with Robbins and Weinman was, we felt that the verdict we brought back basically superseded those. So that's why we didn't. And I think there was confusion on our part with that situation.

THE COURT: All right. At any rate, then, finally, and again in summation, your verdict is that Roger Arnebergh owed E.F. Hutton the $168,307, and E.F. Hutton absorbs the other half, that is $168,307; is that correct?

JUROR ANDERSON: That's correct.

THE COURT: Let me just go down the line and ask each one of you, so we have a completely clear record.

Pauline Adams, is that your understanding of the meaning of the jury verdict?

JUROR ADAMS: Yes, that's correct.

THE COURT: And Glen Anderson?

JUROR ANDERSON: Yes, it is.

THE COURT: Thank you. And Dana Hinman?

JUROR HINMAN: Yes.

THE COURT: And Albert Bocanegra?

JUROR BOCANEGRA: Yes, it is.

THE COURT: And Warren Hamilton?

JUROR HAMILTON: Yes, your Honor.

THE COURT: And Joyce Houle?

JUROR HOULE: Yes.

THE COURT: Thank you.

Well, we appreciate very much your coming in, and we're sorry to have inconvenienced you. I hope it's been made clear that those of you who are still not on jury duty will receive, of course, compensation, the usual daily compensation, for coming in today. I understood that

three of you are still on the panel and will be going possibly for another jury service today.

Is that correct, Duane?

THE CLERK: At the time we talked, it was. I understand from Mrs. Adams that her panel was put over, and I think that the others may be desired upstairs. They weren't listed on panels, but may be plugged in as balances if they're available.

JUROR ANDERSON: Yes, because I never got a notice except from you.

THE CLERK: That was Frank's upstairs decision as an easier way to deal with it.

THE COURT: All right. Well, thank you again very much for coming in.

JUROR HAMILTON: You're welcome. Thank you.

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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HONORABLE MALCOLM M. LUCAS, JUDGE PRESIDING

- - -

E. F. HUTTON & COMPANY, INC., etc. Plaintiff, vs. ROGER ARNEBERGH, et al., Defendants. AND RELATED CROSS-ACTION.	Nos. CV 80-2273-MML CV 80-2721-MML

C E R T I F I C A T E

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on Tuesday,

March 15, 1983, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this ____ day of March, 1983.

_____
Official Reporter

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____ a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19___, at _____ California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ Type or Print Name

_____ Signature

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT

(other than summons and complaint)

Received copy of document described as _____

on _____ 19___.

_____ Type or Print Name

_____ Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 523 West Sixth Street Los Angeles, CA 90014

On May 1 1986, I served the foregoing document described as RESPONDENT'S BRIEF IN OPPOSITION

on interested parties

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Marcus E. Crahan, Jr., Esq.
707 Wilshire Blvd., Suite 400
Los Angeles, CA 90017

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on May 1, 19 86 at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on _____, 19___, at _____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

SANDY STEWARD
Type or Print Name

Sandy Steward
Signature

STUART'S EXHIBOOK TIMESAVER (REVISED 6/83)
Also for use in California State or Federal Courts